Supreme Court, U.S.
FILED
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No. 92-538

In The

Supreme Court of the United States

October Term, 1992

DONALD W. PELFRESNE,

Petitioner,

v.

VILLAGE OF WILLIAMS BAY, a Municipal Corporation, LeMARR R. LUNDBERG, President; GEORGE JOHNSON, JAMES LOVELL, RAY LOYD, PATRICIA STEVENSON, ROBERT RAYMOND, BONNIE VAN GORDER, Trustees; VIRGINIA STENUS, Clerk; and FRANK LINDLEY, Building Inspector,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO WRIT FOR CERTIORARI

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October 21, 1992

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QUESTIONS PRESENTED FOR REVIEW

I. Can a judicial finding of public nuisance and demolition, both on grounds of general unreasonableness of repair and specific unreasonableness of cost of repair under Wis. Stat. § 66.05, constitute an invalid exercise of the state's police power under the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

II. Can a lawful Wisconsin judgment of public nuisance and demolition bar a subsequent purchaser of real property in privity with such judgment defendant from pursuing claims for injunctive relief under the Anti-Injunction Act, 28 U.S.C. § 2283?

III. Did the Seventh Circuit Court of Appeals err in denying the subsequent purchaser's requests to amend his complaint to allege money damages or constitutional violations despite the Anti-Injunction bar and his determined privity with the Wisconsin Judgment defendant?

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STATEMENT OF THE CASE

Respondents adopt the Statement of the Case set forth by the Circuit Court of Appeals at App. 2-7.

ARGUMENT

I. THE DECISION BELOW IS FACTUAL, NOT CONSTITUTIONAL, BASED ON THE FULLY LITIGATED PUBLIC NUISANCE TRIAL AGAINST PELFRESNE'S UNCLE SCHIESSLE AND UPON THE TWO FEDERAL COURT EVIDENTIARY HEARINGS.

As framed by the Seventh Circuit (App. 4), the issue was whether the facts in the record were sufficient to establish that Pelfresne had actual or inquiry notice of the Trial and Appeals Court Raze Judgment against his uncle, Michael Schiessle, finding the subject property unsafe and unfit for habitation and unreasonable to repair. If so, Pelfresne was in privity with his uncle and the Federal Anti-Injunction Act prohibited Pelfresne's request of the Federal Court to enjoin the enforcement of Walworth County, Wisconsin Raze Judgment. (App. 5-6)

The three Seventh Circuit opinions below, cite and recite facts that inexorably lead the Court to the conclusion that Donald Pelfresne, largely on the basis of his own testimony introduced in District Court, either knew or was charged with knowing facts leading to the raze order. The case law doctrine of inquiry notice cited below (App. 5) was codified in the "good faith" requirement under Wisconsin's notice race statute, at 786.101(3). Therefore, the factual findings of the District and Appeals

Court dictated dismissal under both authorities, (and under the case law cited in its decision, App. 5-6).

The record below contained more facts than those testified to at two evidentiary hearings in Federal Court, that found Uncle Michael Schiessle deeding this property to trusts he controlled and eventually deeding directly to his nephew, supposedly without revealing the Raze Judgment recently affirmed by the Wisconsin Appeals Court (*Village of Williams Bay v. Schiessle*, 138 Wis.2d 83, 405 N.W.2d 695 (1987), cert. denied, 415 N.W.2d 162 (Wis. 1987)). There were more facts than the Seventh Circuit's finding that Donald Pelfresne "was not an independent purchaser, and simply a pawn in his uncle's game to defeat the Raze Order despite the finality of the Wisconsin Court Judgment" and when Pelfresne claimed he merely "did everything his uncle told him to do," he still had the duty to make reasonable inquiry which would have easily and surely revealed the Raze Judgment. (App. 7-8)

Introduced into the record, and considered below, were:

1. Portions of the three-day trial transcript in Walworth County, Wisconsin Court;
2. The Memorandum Decision and Judgment of Walworth County Circuit Court Judge Robert Reed against Schiessle, Ely, and Koch; and
3. The opinion of the Wisconsin Appeals Court referenced above.

The transcript makes it clear (as found by the Wisconsin Appeals Court) that testimony was received that the four subject structures were unoccupied and open to

the elements for a period of over 12 years, were so structurally unsound that the moisture in support structures was found to be all that held them up, not to mention near total violation of electrical, plumbing, heating and construction codes. (RESP. 9-10)

Furthermore, the county trial court, on this factual basis found that the building inspector's Raze Order, finding the buildings "so out of repair as to be dangerous, unsafe, insanitary, and otherwise unfit for human habitation, occupancy or use" such that "it is unreasonable to repair the same" was both reasonable and in compliance with Wis. Stat. § 66.05(1)(a). (RESP. 2, 4) Only as an additional basis for its decision does the court also find that repair cost clearly exceeds 50% of the assessed value, thereby meeting the Wis. Stat. § 66.05(1)(b) presumption of "unreasonableness." (RESP. 7-8)

Finally, the Wisconsin appeals Court (RESP. 9-10), in affirming the trial court's affirmation of the building inspector's Raze Order, found:

> "These properties were uninhabited for many years. Windows were broken and furniture was laying in the yard, making access to children easy and convenient as well as dangerous. The record discloses that children had parties in the houses and played around the furniture.
>
> Inspection revealed substantial problems with all four buildings. For instance, doors were gone; the only thing holding the lumber together in each building was moisture; there were holes in the exterior of the buildings such that a complete siding job would be needed to keep animals out; and there were defective exits

such that the porches needed repair. Additionally, there were plumbing, heating and electrical problems in all of the buildings."

These facts support the subsequent findings that the Walworth County Judgment found that these four buildings could not reasonably be repaired under Wis. Stat. § 66.05(1)(a). That finding was separate and apart from meeting the presumption of unreasonableness by cost yardstick in § 66.05(1)(b). The Seventh Circuit ruled that Nephew Pelfresne had constructive notice of these judicial findings at the time of his purchase, through his uncle, Michael Schiessle.

II. THE REASON THE SEVENTH CIRCUIT FOUND PELFRESNE'S AMENDED COMPLAINT/CONSTITUTIONAL ARGUMENTS "OF NO MERIT," IS THAT PELFRESNE IMAGINES THE "COST" OF REPAIRS *OPTION*, TO BE A § 66.05 *REQUIREMENT* AND ALSO IGNORES THE ALREADY DECIDED CASE, *POSNANSKI V. CITY OF WEST ALLIS*, 61 Wis.2d 461, 213 N.W.2d 51 (1973).

Pelfresne attempts to create a constitutional issue where none has been found to exist, by misstating the standard by which Wis. Stat. § 66.05 determines a structure to be a public nuisance, in order to even argue it fits under the "nexus" concept of *Nollan v. California Coastal Commission*, 483 U.S. 825, 97 L.Ed.2d 677, 107 S. Ct. 3141 (1987). Pelfresne repeatedly mistates § 66.05 as *requiring*

demolition only if the "*cost*" of repair is "unreasonable," i.e., exceeds 50% of assessed value.[1] Repeating a misstatement of the law, does nothing to prove the statement.

The true § 66.05 standard to determine if a building is so old, dilapidated or out of repair as to be dangerous, unsafe, insanitary or otherwise unfit for human habitation, occupancy or use, is not unreasonableness of the "*cost*" of repair. Section (1)(a) clearly states the standard to be "unreasonable to repair," for whatever reason, cost merely and obviously being one of the possible reasons.

---

[1] a. From Petitioner's statement of the case (p. 1): "Section 66.05 of the Wisconsin Statute which prohibits the repair of a dilapidated building where the cost of repair is unreasonable and requires the demolition of such buildings."

b. From Petitioner's headnote I (p. 3): "The raze order which defendants imposed on Pelfresne has the effect of prohibiting the repair of a building where the cost of repair will exceed 50% of the adjusted value . . . "

c. From Petitioner's Argument (p. 5): "Thus, the Wisconsin raze order statute links a real property owner's ability to rehabilitate and repair dilapidated housing with a dollar test."

d. From Petitioner's Argument (p. 5): " . . . the statute's arbitrary 50% of value/reasonableness requirement . . . "

e. From Petitioner's Argument (p. 7): " . . . that states such as Wisconsin which impose dollar limitations on repairs of dilapidated buildings . . . "

f. From Petitioner's Argument 9 (p. 7): " . . . the condition in this case (ie., permitted repair only if cost of repair is less than 50% of adjusted value or reasonable . . . "

g. From Petitioner's Argument (p. 8): " . . . the 50% dollar condition . . . "

h. From Petitioner's Argument (p. 10): " . . . similar mandatory demolition statutes with percentage of repair costs to value restrictions . . . "

To bootstrap his constitutional argument, Pelfresne misreads section (1)(b) of § 66.05 as inserting the word "cost" into the general "unreasonable to repair" standard of (1)(a) and misreads the clearly stated, and rebuttable "presumption" of unreasonableness solely on this "cost" factor, as a "requirement" (see footnote 1).

The Seventh Circuit finds this proposed amendment to the complaint and this imagined meaning of § 66.05 to be "of no merit" because the Wisconsin Supreme Court already ruled on this very question, in *Posnanski, supra,* p. 53:

> "It appears that the appellant herein would not argue that a municipality, under proper legislation, could not prevent the rebuilding of a dilapidated structure if the costs of so doing was unreasonable. Rather, the argument is that the selection of the benchmark of 50 percent of the formula value is an arbitrary figure unrelated to the needs of an individual case.
>
> Our reading of the statute, however, persuades us that the legislative intent was merely to create a presumption that the repairs were unreasonable if their cost exceeded 50 percent of the formula value. This is the plain and unequivocal meaning of that portion of sec. 66.05(1)(b), Stats., that provides 'such repairs shall be *presumed* unreasonable and it shall be *presumed* for the purposes of this section that such building is a public nuisance.'" (emphasis supplied)

Furthermore, as argued in section I above, the Walworth County Trial Court found these four structures

were so structurally insanitary and unsafe, it was "unreasonable to repair the same" under the § 66.05(1)(a) standard, in *addition* to finding they were unreasonable to repair under the § 66.05(1)(b) standard of unreasonable *cost* of repair. The Wisconsin Appeals Court also so found. (RESP. 1-12)

These facts and this law, cited to the District court and the Seventh Circuit at every juncture of Pelfresne's repeated requests to amend his Complaint under *Nollan, supra,* and *Penn Central Transportation v. New York City,* 438 U.S. 109 (1978) are why the courts below found the requests to be "of no merit" and "frivolous," (App. 8; *Pelfresne v. Williams Bay,* 917 F.2d 1017, 1023 (7th Cir. 1990), citing *Baker v. Mueller,* 222 F.2d 180 (7th Cir. 1955) and *City of Appleton v. Bran Schweiler,* 52 Wis.2d 303, 190 N.W.2d 545 (1972)). Since there is no "arbitrary 50% of value/reasonableness *requirement*" as imagined by Pelfresne at page 5 of his brief, there can be no failure of a "nexus" between that supposed requirement and the public safety interest under *Nollan, supra.*

III. THEREFORE THE SEVENTH CIRCUIT DID PROPERLY DETERMINE PELFRESNE'S PROPOSED AMENDED COMPLAINT HAD "NO MERIT" AND DID SO WITHIN ITS DISCRETIONARY POWERS.

Pelfresne makes clear that his Amended Complaint claims are premised upon: Williams Bay " . . . unlawfully prevented him and his predecessors in title from repairing . . . " (p. 11), that it was " . . . caused by unlawful taking" (p. 11) and that the " . . . effect of . . . Court of

appeals' affirmance is to foreclose plaintiff from challenging in this case the constitutional infirmities of the Wisconsin raze order statute" (p. 13). Obviously, Pelfresne asks the Court to allow amended causes of action that must emanate from an "unlawful" or "unconstitutional" taking that the Walworth County Trial Court, the Wisconsin Court of Appeals, the Wisconsin Supreme Court (by denial of certiorari), the U. S. District Court, and the Seventh Circuit Court of Appeals have already found to be lawful. That is why the courts below have repeatedly found Pelfresne's claims to be frivolous and of no merit, which *Foman v. Davis*[2] *supports* as reasons to deny amendment to pleadings (See quotation at Petitioner's brief p. 12).

That is why the Village of Williams Bay urges this Court to deny Pelfresne's Petition and award costs appropriate to this frivolous petition.

CONCLUSION

The decision below is well substantiated by facts found upon actual testimony, which establish inquiry notice to Pelfresne of the Raze Judgment entered against his uncle. That factual finding in turn establishes the privity effectuating the Anti-Injunction Act's prohibition against interfering with the duly tried and affirmed Wisconsin Judgment to raze these buildings.

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[2] 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed 2d 222 (1962)

Mischaracterizing the presumptive standard of unreasonableness by cost of repair in § 66.05(1)(a), destroys Pelfresne's attempt to argue unconstitutionality under *Nollan*, and *Penn Central, supra*. It also destroys his Amended Complaint claims which are necessarily *based* on an "unlawfulness" of a taking of private property, since the court here finds it to be lawful.

This petition should be rejected for the same "no merit" and "frivolous" findings made by the 7th Circuit Court of Appeals below.

Respectfully submitted,

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October 21, 1992

APPENDIX

STATE OF WISCONSIN
CIRCUIT COURT ROCK COUNTY

****

VILLAGE OF WILLIAMS BAY,
a political subdivision,

Plaintiff,

vs.

MICHAEL SCHIESSLE,
a/k/a MICHAEL SHIESSLE,
LOMMEN D. ELEY, and
JOHN P. KOCH

Defendants.

ORDER AND JUDGMENT

CASE NO.
85-CV-708
(Filed
June 25, 1986

****

The application for Restraining Order in the above-captioned matter having been filed by Defendants on July 23, 1985, by their attorneys Godfrey, Pfeil & Neshek, S.C., restraining the Building Inspector for the VILLAGE OF WILLIAMS BAY from proceeding under Wis. Stat. 66.05 to raise and remove pursuant to his Order, attached hereto marked Exhibit "A" and made a part hereof, and, upon the Court restraining same pending a hearing on the matter, which was held before this Court on September 24, 1985, December 3, 1985, and April 15, 1986, and the Defendants having appeared as indicated and the Plaintiff by Attorney Richard R. Grant of Consigny, Andrews, Hemming & Grant, S.C., Janesville, Wisconsin, and upon all of the evidence and filings made in this matter and the briefs of the parties and the Court having made its Findings of Facts and Conclusions of Law set

forth in the Memorandum Decision, attached hereto and marked Exhibit "B" and made a part hereof,

NOW, THEREFORE, it is hereby ordered, adjudged, and decreed as follows:

(1) That the Order of the Building Inspector for the VILLAGE OF WILLIAMS BAY dated June 3, 1985, is found reasonable and in compliance with Wis. Stat. 66.05 and any previous restraining order of this Court is hereby dissolved;

(2) That the Defendants shall have thirty (30) days from the entry of this Order to comply with said order;

(3) That, if Defendants do not so comply Plaintiff, VILLAGE OF WILLIAMS BAY, may raise and remove the buildings described in said Notice and charge cost of same against the real estate upon which said buildings are located and it shall be a lien upon said real estate and shall be assessed and collected as a special tax, together with all other rights and remedies granted VILLAGE OF WILLIAMS BAY under said statute;

(4) That Plaintiff, VILLAGE OF WILLIAMS BAY, is a duly constituted village under the statutes of the State of Wisconsin with a mailing address of P.O. Box 580, Williams Bay, Walworth County, Wisconsin, and engages in the operation of said village under Wisconsin Law; Defendant, MICHAEL SCHIESSLE, is an adult resident of 805 Northwest Highway, Parkridge, Illinois, and is engaged in the profession of law; that Defendant, LOM-MEN D. ELEY is an adult residing at 127 North Deerborn Street, Suite 631, Chicago, Illinois, and is engaged in the practice of law; that Defendant JOHN P. KOCK, is an

adult residing at 127 North Deerborn Street, Suite 631, Chicago, Illinois, and is engaged in the practice of law;

(5) That the VILLAGE OF WILLIAMS BAY is granted costs and disbursements as allowed by law and as set forth on the Bill of Costs said Village has filed herein in the sum of $629.42.

DATED this 25th day of June, 1986.

BY THE COURT:

/s/ Robert D. Read
Robert D. Read

EXHIBIT "A"

[SEAL]

VILLAGE OF WILLIAMS BAY

P.O. BOX 580

WILLIAMS BAY, WISCONSIN

ORDER OF BUILDING INSPECTOR TO RAZE AND REMOVE BUILDINGS OR PART THEREOF

TO: Michael Schiessle,
a/k/a Michael Shiessle,
Lommen D. Ely,
John P. Koch, and
Godfrey, Pfeil & Neshek, S.C.,
Attorneys for said owners

Pursuant to the provisions of Wisconsin Statutes 66.05(1)(a), you are hereby ordered to raze and remove the four (4) buildings in the back of the two houses

known as 150 and 152 Williams Street, Williams Bay, Wisconsin, all located on the property described as follows:

> A parcel of land located in the NE¼ of Sec. 1, T1N, R16E, in the Village of Williams Bay, described as follows; to wit: Beginning at the NE corner of the Bethel Block, a subdivision in said Sec. 1 T1N, R16E, and the plat of which is on record in the Register of Deeds Office in and for said Walworth County on page 281 of Volume 5 of Plats; thence N. 1° 08'W. along the West line of Williams Street 200 feet; thence s. 88° 50'W. parallel to the N. line of said Bethel Block, 264 feet, thence S. 1°08'E. 200 feet to the NW corner of said Bethel Block, thence N. 88° 50'E. along said N. line of Bethel Block, 264 feet to the place of beginning

within 20 days from the service of this Order upon you.

The buildings described above have become so out of repair as to be dangerous, unsafe, insanitary, and otherwise unfit for human habitation, occupancy or use, and it is unreasonable to repair the same.

In addition to the removal of the above-described buildings, you are ordered to repair or replace the porch adjoining the building at 152 Williams Street, Williams Bay, Wisconsin.

If you fail to comply with this order within the time prescribed, the inspector of buidings [sic] or other designated officer shall cause such buildings or part thereof to be razed and removed and shall charge the cost of such razing and removal against the real estate upon which said buildings are located and shall be a lien upon such

real estate and shall be assessed and collected as a special tax.

You are further notified that you may, within the time provided by Sec. 893.76, Wis. Stats., apply to the Circuit Court for an Order restraining the inspector of buildings or other designated officer from razing and removing the building or part thereof, or forever be barred. Should you apply to the Circuit Court for such an Order, the hearing upon your request shall be held within 20 days and shall be given preference by the Court.

DATED this 3 day of June, 1985.

/s/ Frank B. Lindley
Building Inspector

EXHIBIT "B"

STATE OF WISCONSIN: WALWORTH COUNTY:
CIRCUIT COURT:
Branch I

VILLAGE OF WILLIAMS BAY,
a political subdivision,

Plaintiff,

vs.

MICHAEL SCHIESSLE, a/k/a/
MICHAEL SHIESSLE, LOMMEN
D. ELEY and JOHN P. KOCH,

Defendants.

MEMORANDUM DECISION

File No.
85 CV 708

This application for a restraining order was filed by the defendants on July 23, 1985 in response to an order of the Village of Williams Bay building inspector, dated June 3, 1985, entitled Order of Building Inspector to raise and remove buildings or part thereof. A prior action resulting from a similar order was dismissed by the Court on August 7, 1985. A hearing was held before the Court on August 28, 1985, with the plaintiff appearing by Attorney Andrew Hack (by telephone), and the defendants appearing by Attorney Thomas Neshek. It was agreed that the old action was dismised [sic] and the most recent request for a restraining order would be placed in a new file.

The defendants also filed a request for substitution of judge and the matter as assigned to this Court on September 12, 1985. A hearing was held before this Court on September 24, 1985, with the plaintiff appearing by Attorney Richard Grant and the defendants appearing by Attorney Thomas Neshek. It was agreed by the attorneys that Lommen D. Eley and John P. Koch were the only remaining defendants to this action. This matter was continued to December 3, 1985 for further testimony and was finally concluded on April 15, 1986.

The initial briefs were received by the Court on May 6, 1986. The defendants' reply brief was received on May 12, 1986, and the reply brief of the plaintiff was received on May 16, 1986. The Court has reviewed the entire file, including the numerous photographs of the buildings in question. The Court notes that neither of the parties requested the Court to view the property, even though such a view would have been helpful in reaching the final decision in this case.

The parties disagree as to burden of proof necessary for the Court to determine whether the building inspector's order was reasonable or unreasonable. Neither side has presented any legal authority that this Court finds determinative of this issue, and therefore, the Court adopts the ordinary burden of proof, which is to a reasonable certainty by the greater weight of the credible evidence.

The Court finds from the record that the defendants have not met their burden of proof. In *Donley v. Boettcher*, 79 Wis.2d 393 the Wisconsin Supreme Court stated:

> "Neither the inspector nor the trial court can look at the building and determine the repairs needed without considering the use to which the building is to be put. The inspector and the court must comply with the general principle discussed above that the abatement of a nuisance is limited to the necessities of the case."

While the Court does not dispute or discredit or disagree with any of the testimony of the expert witness presented by the defendants, the Court agrees with the plaintiff that the necessary repairs must do more than repair these buildings to sit idle for another ten years. The buildings must be repaired so that they can be used for rental property and human inhabitation.

In viewing the photographs and the testimony, including the testimony of Mr. Goebel, the Court has no doubt that the cost of repairs for the intended use, including compliance with the building code of the Village of Williams Bay, would be far in excess of the fifty percent of the formula value as agreed to by the parties. This is true as to all four of the buildings.

Upon all the files, records and proceedings herein, the Court finds that the order of the building inspector is reasonable, not erroneous, and is fully in compliance with his statutory duties. Therefore, an order will be entered dissolving the restraining order and allowing the relief indicated in the order of the building inspector.

The defendants will have 30 days from the entry of the order signed by the Court in which to comply with the order. The attorney for the plaintiff will prepare the appropriate order and judgment consistent with the record and the findings and judgment of this Court, to be submitted to the Court as soon as possible.

Dated this 12th day of June, 1986, at Elkhorn, Wisconsin.

BY THE COURT:

/s/ Robert D. Read
ROBERT D. READ -
Circuit Judge

copy to: Mr. Grant
Mr. Neshek

No. 86-1358

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT II

VILLAGE OF WILLIAMS BAY,
a political subdivision,

Plaintiff-Respondent,

v.

MICHAEL SCHIESSLE a/k/a
MICHAEL SHIESSLE, LOMMEN D.
ELEY and JOHN P. KOCH,

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Walworth county: ROBERT D. READ, Judge. *Affirmed.*

Before Scott, C.J., Brown, P.J., and Nettesheim, J.

BROWN, P.J. The Village of Williams Bay successfully withstood a challenge to its building inspector's order that defendants raze and remove four buildings. Defendants appeal, claiming that the "cost of . . . repairs" does not exceed the 50% statutory formula value pursuant to sec. 66.05(1), Stats. We disagree and affirm.

The defendants are Lommen D. Eley and John P. Koch who administrate a trust benefiting Michael Schiessle. The trust holds title to the property in this action, namely four buildings in the back of two houses known as 150 and 152 Williams Street in Williams Bay.

These properties were uninhabited for many years. Windows were broken and furniture was laying in the

yard, making access to children easy and convenient as well as dangerous. The record discloses that children had parties in the houses and played around the furniture.

Inspection revealed substantial problems with all four buildings. For instance, doors were gone; the only thing holding the lumber together in each building was moisture; there were holes in the exterior of the buildings such that a complete siding job would be needed to keep animals out; and there were defective exits such that the porches needed repair. Additionally, there were plumbing, heating and electrical problems in all of the buildings.

The parties stipulated to the amount necessary to equal the 50% property value calculation under sec. 66.05(1)(b), Stats. These values are: Building 150A – $4,401.90; Building 152A – $5,502.37; Building 154 – $4,732.04; and Building 154A – $3,301.42. The building inspector concluded that the costs of repair for the buildings would far exceed these figures. It is this conclusion that is debated by the defendants.

The defendants' assertion is based upon the testimony of an architect who represented that the true cost of repair for each of these buildings was under the stipulated 50% values. The architect time and again focused upon repairs that would make the premises safe from hazards to the public. At the same time, the architect commented upon the building inspector's repair list and opined that he would disregard any listed repair cost having to do with occupancy, human habitation and use.

The architect's opinion no doubt stems from language in *Donley v. Boettcher*, 79 Wis.2d 393, 255 N.W.2d

574 (1977). In that case, the supreme court held that the list of repairs deemed necessary by the building inspector went too far. The court wrote:

> The trial court ordered Donley to install operable electrical service to the building and repair the heating and plumbing systems. These repairs relate to making the building fit for human habitation, occupancy or use. As the testimony revealed, the public would have no access to this building, and there was no evidence of harm to the public from the interior or exterior of the building if the building were closed for any uses. Because the purpose of this statute is to eliminate hazards to the public associated with old, dilapidated buildings and not necessarily to make such buildings tenantable, the trial court's remedy went beyond the necessities of the case. The repairs ordered would restore the building to a condition in which it could again be used to house a law office and barbershop. The repairs were not required to make the building which was found not to be in danger of structural collapse, safe or sanitary for the public.

Id. at 407, 255 N.W.2d at 580. As in *Donley*, the defendants here claim that the only repairs relevant are those necessary to make the buildings structurally sound such that they are not in danger of collapse and are safe and sanitary for the public. Defendants argue that the building inspector included in his list of repairs such items as faulty heating and plumbing, a new paint job and siding, lack of insulation, faulty water heater and inadequate off-street parking. The defendants conclude that their expert's narrower focus on only those repairs necessary

to eliminate the hazards to the public were germane to the issue. To add heating, plumbing and the like would be contrary to *Donley*.

As pointed out cogently by the trial court, however, the *Donley* case is easily distinguishable. In *Donley*, the owner had no intention of allowing human habitation in the building. He was not intending to again house a barbershop and law office. Since the purpose of the statute is to eliminate hazards to the public, and since the public would not be allowed in the building, the repairs necessary in that case were only those required to make the building as safe for the public as they were *intended* to be used.

Here, however, the evidence is that defendants intended to rent the property. Ads had appeared in the local paper offering the buildings for rent, which ads appeared for about four months. As the *Donley* case itself said:

> Neither the inspector nor the trial court can look at the building and determine the repairs needed without considering the use to which the building is to be put. The inspector and the court must comply with the general principle discussed above that the abatement of a nuisance is limited to the necessities of the case.

Id. The use of the buildings here was to rent the premises. To rent the premises, it is not enough to repair a building so that it is safe and sanitary; it must also be fit for habitation, occupancy and use. That is what sec. 66.05(1)(a), Stats., mandates a building inspector to take into consideration. If the purpose of the building is to

inhabit it, then it is a danger to the public if it is determined to be unfit for that purpose.

The trial court's duty is to determine the reasonableness of the building inspector's order. *Donley,* 79 Wis.2d at 406, 255 N.W.2d at 579-80; *see also* sec. 66.05(3), Stats. Whether a building inspector's order is reasonable is a question of law. *See Wassenaar v. Panos,* 111 Wis.2d 518, 525, 331 N.W.2d 357, 361 (1983). As in *Wassenaar,* however, the finding of unreasonableness is so intertwined with the trial court's factual findings that we will give more credence to this legal determination by the trial court than we do with other legal questions. *Id.*

The trial court applied the correct legal standard after observing the defendants' intended use of the premises. Based upon this, we affirm.

By the Court. – Judgment affirmed.

Recommended for publication in the official reports.